STATE OF MICHIGAN

COURT OF APPEALS

SHEHENIA GLEAVES, Plaintiff-Appellee,	UNPUBLISHED March 27, 2014
v	No. 312523 Wayne Circuit Court
RAYMUNDO DELEON, Defendant-Appellant.	LC No. 11-006160-NO

Before: METER, P.J., and JANSEN and WILDER, JJ.

PER CURIAM.

Defendant appeals by leave granted[1] an order denying his motion for summary disposition. We reverse.

Defendant first argues that the icy condition of the concrete walkway outside plaintiff's apartment was open and obvious and that no special aspect existed that would remove the danger from the open-and-obvious doctrine. Specifically, defendant contends that an average person of ordinary intelligence would have discovered the icy condition upon casual inspection because of the weather conditions at the time of the accident and because plaintiff could observe the ice glistening after her fall. We agree.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10). This Court reviews de novo a trial court's decision on a motion for summary disposition. *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012). A motion for summary disposition pursuant to MCR 2.116(C)(8) is a test of the legal sufficiency of the complaint. *Johnson v Pastoriza*, 491 Mich 417, 434-435; 818 NW2d 279 (2012). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id*. at 435. "A motion under MCR 2.116(C)(8) may be granted only when the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id*. (internal citation and quotation marks omitted). However, "[o]nly the pleadings may be considered when the motion is based on subrule (C)(8) . . . ." MCR

[1] *Gleaves v Deleon*, unpublished order of the Court of Appeals, entered April 17, 2013 (Docket No. 312523).

2.116(G)(5). In his motion for summary disposition, defendant relied on evidence beyond the pleadings. Accordingly, review of defendant's claim under MCR 2.116(C)(8) is inappropriate.

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). This Court reviews a "motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition is properly granted "if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id*. A genuine issue of material fact exists "when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

In general, a premises possessor owes a duty to an invitee in premises-liability cases. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). An invitee is "a person who enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises . . . ." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000). A tenant is the invitee of the landlord. *Benton v Dart Properties, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). It is undisputed that plaintiff was an invitee on December 30, 2010, when she slipped outside her apartment.

Landlords generally owe a duty to their invitee tenants to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo*, 464 Mich at 516. A landlord

> is subject to liability for physical harm caused to his invitees by a condition on the land if the owner: (a) knows of, or by the exercise of reasonable care would discover, the condition and should realize that the condition involves an unreasonable risk of harm to such invitees; (b) should expect that invitees will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect invitees against the danger. [*Stitt*, 462 Mich at 597.]

However, absent special aspects, this duty generally does not require the owner to protect an invitee from open and obvious dangers. *Lugo*, 464 Mich at 517. If the dangers of the premises are known to the invitee or are obvious to an extent that the invitee could reasonably be expected to discover them, the premises owner does not owe a duty to protect or warn the invitee, unless "special aspects of a condition make even an open and obvious risk unreasonably dangerous . . . ." *Id*. at 516-517. Generally, whether a condition is open and obvious is considered objectively, considering whether an average person with ordinary intelligence would have discovered the condition upon casual inspection. *Price v Kroger Co of Michigan*, 284 Mich App 496, 500-501; 773 NW2d 739 (2009).

Only special aspects "that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious

danger doctrine." *Lugo*, 464 Mich at 519. This "special aspects" exception to the open-and-obvious doctrine is a narrow one. *Hoffner*, 492 Mich at 462. Michigan Courts have recognized two instances in which special aspects of an open and obvious danger may give rise to liability: when the danger is unreasonably dangerous or when the danger is effectively unavoidable. *Id*. at 463. "Unavoidability is characterized by an inability to be avoided, an inescapable result, or the inevitability of a given outcome." *Id*. at 468 (italics removed). Further, the "hazard must be unavoidable or inescapable in effect or for all practical purposes." *Id*. (italics removed). A commercial building with only one exit for the general public where the floor is covered with standing water constitutes an effectively unavoidable hazard. *Lugo*, 464 Mich at 518.

No genuine issue of material fact exists regarding whether the icy condition of the concrete walkway was open and obvious. The precise question lies in whether an average person with ordinary intelligence would have discovered that the concrete walkway was icy upon casual inspection on the morning of December 30, 2010. In *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 483; 760 NW2d 287 (2008), this Court stated that because black ice is either invisible or nearly invisible, it is inherently inconsistent with the open-and-obvious doctrine. Specifically, the Court declined to extend the doctrine to black ice "without evidence that the black ice in question would have been visible on casual inspection before the fall or without other indicia of a potentially hazardous condition." *Id*. Other indicia of a potentially hazardous condition include the specific weather conditions present at the time of the fall. *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934, 935; 782 NW2d 201 (2010). Whether a fall occurs during winter, what the temperatures were before and at the time of the fall, whether snow was present on the premises, whether mist and light rain were present before or at the time of the fall, and whether other wintry conditions existed at the time of the fall are all relevant to an analysis of whether an average person of reasonable intelligence would have discovered the danger upon casual inspection. See *id*. The amount of lighting in the area of a fall is also relevant to whether a dangerous condition is open and obvious. See *Abke v Vandenberg*, 239 Mich App 359, 362-363; 608 NW2d 73 (2000), in which this Court affirmed the trial court's denial of the defendant's motion for a directed verdict because the plaintiff testified that it was dark in a loading bay and that he fell off a loading dock because of the dark condition.

Here, the evidence provided by the parties shows that indicia of wintry conditions existed on the morning of December 30, 2010, and that an average person of ordinary intelligence would have discovered the icy condition upon casual inspection. When plaintiff exited her apartment on December 30, 2010, the temperature was approximately 32 degrees and she could feel misting on her face. Further, the fall occurred during the winter season, and approximately five inches of snow had accumulated on the ground in the Detroit area on December 30, 2010. Though plaintiff claimed that she could not see any ice on the walkway before her fall, she noticed the sidewalk "glistening" with ice after she had fallen. Plaintiff's observation of the walkway glistening after the fall contradicts plaintiff's claim that she slipped on black ice, because the icy condition was apparently visible. These facts all point towards the icy condition of the concrete walkway falling within the open-and-obvious danger doctrine.

The evidence is unclear regarding how much lighting was present in the area where plaintiff fell. In *Abke*, 239 Mich App at 362-363, this Court held that the amount of light in an area is relevant to whether a danger is open and obvious. Plaintiff stated that the area was dimly lit and that there was only one light illuminating the rear of the house. Defendant stated that

there were three lights that would generally illuminate the rear of the house, but that he did not know which, if any, of the lights were on at the time of plaintiff's fall. If plaintiff noticed the icy walkway glistening after her fall, it follows that, upon casual inspection, an average person of ordinary intelligence would have noticed the walkway glistening before the fall. Simply put, the wintry conditions on the morning of December 30, 2010, combined with the visible glistening of the icy walkway, would have put an average person of ordinary intelligence on notice that there was a danger of slipping on the walkway. Accordingly, no genuine issue of material fact exists regarding whether the icy condition of the concrete walkway was open and obvious.

Further, the open-and-obvious hazard does not fall within the "special aspects" exception. Plaintiff argues on appeal that the concrete was effectively unavoidable because the icy condition existed outside the only exit to her home. Accordingly, plaintiff argues, she was effectively trapped inside her home until the icy condition subsided or was rectified. We note that in *Hoffner*, 492 Mich at 469-470, the Court held that an icy sidewalk leading to the only entrance to a private fitness facility did not constitute an effectively unavoidable danger, because the plaintiff could have simply chosen not to confront the open and obvious danger. More significantly, in *Perkoviq v Delcor Homes-Lake Shore Pointe Ltd*, 466 Mich 11, 19-20; 643 NW2d 212 (2002), the Court found that slippery conditions encountered by construction workers as a necessary part of their work did not constitute an effectively unavoidable hazard, because the open-and-obvious danger could have been avoided through the use of precautions by the workers. Here, because the icy condition of the sidewalk was open and obvious, plaintiff could have chosen different footgear, used other precautions to avoid slipping, or used the readily available salt on the rear porch of the house. The icy sidewalk does not fall within the narrow "effectively unavoidable" exception.

Defendant argues that he is not liable for plaintiff's injuries because he had no notice of the icy condition that led to plaintiff's fall. Specifically, defendant contends that the compressed time frame between freezing rain falling in the area of plaintiff's apartment and her actual fall meant that defendant could not have known about the icy condition. We will assume, without deciding, that in certain portions of plaintiff's complaint she adequately pleaded a cause of action falling outside the parameters of the open-and-obvious doctrine, and thus we will address this issue.

A possessor's duty to protect an invitee extends only to those hazards about which it has actual notice or would discover in the exercise of reasonable care. *Stitt*, 462 Mich at 597. Constructive notice can be established if the invitee presents evidence to show that the hazard existed for a sufficient period of time that the possessor should have had knowledge of it. *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001). Similar principles apply with regard to landlord-tenant law. See, generally, *Raatikka v Jones*, 81 Mich App 428, 430-431; 265 NW2d 360 (1978). Further, a possessor may be liable for dangerous conditions resulting from the active negligence of the possessor, regardless of whether the possessor has notice of the hazard. *Id*.

Here, no evidence existed on the record that the concrete walkway was icy during the evening of December 29, 2010. Plaintiff testified that when she arrived home on December 29, 2010, at approximately 5:00 p.m., the walkway was not icy. Weather reports from December 30, 2010, indicate that freezing rain fell in the area of plaintiff's apartment between 2:00 a.m. and

4:00 a.m. and that five inches of snow were already on the ground. Because plaintiff's slip and fall occurred at approximately 2:30 a.m., the icy condition is unlikely to have existed for more than 30 minutes before plaintiff fell. Defendant went to sleep at approximately 10:30 p.m. on December 29, 2010. There is no evidence to suggest that defendant had actual notice of the icy condition at the time plaintiff slipped and fell. Further, defendant did not have constructive notice of the icy condition. The icy condition apparently formed between 2:00 a.m. and 2:30 a.m., at which time defendant was asleep. A mere 30 minutes, during the early morning hours, is not a sufficient period such that a possessor of land should reasonably have known that icy conditions existed. To hold that defendant should have had notice of the condition under these circumstances would equate to a requirement that residential landlords check for icy conditions every 30 minutes, or more, during the winter months, 24 hours a day. Such a requirement is unreasonable and has never been recognized by Michigan courts.

Plaintiff also argues that defendant's alleged failure to sufficiently light the rear of the house constituted negligence that actively contributed to the dangerous condition. However, this argument misstates the factual circumstances of plaintiff's fall. The dangerous condition that led to defendant's injury was the icy concrete, not darkness in the rear of the house. Defendant clearly played no part in the ice forming on the concrete; the ice was the natural result of freezing rain in the area. Accordingly, there is no genuine issue of material fact that defendant lacked notice of the icy conditions, and defendant did not negligently cause the icy condition himself.

Reversed.

/s/ Patrick M. Meter
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder